

BERTHA ORNELAS, o/b/o
 K.M., a minor child,

 Plaintiff,

 v.

 MICHAEL J. ASTRUE,
 Commissioner of Social
 Security,

 Defendant.

)
) No. CV-07-3098-JPH
)
) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND REMANDING FOR FURTHER
) PROCEEDINGS
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BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on August 18, 2008. (Ct. Rec. 18, 22.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**) and remands the matter to the Commissioner for additional proceedings. Defendant's Motion for Summary Judgment (Ct. Rec. 22) is **DENIED**.

The current application for Social Security Income ("SSI")

1 benefits on behalf of a minor child (plaintiff), was protectively
2 filed on May 5, 2005, alleging disability since that date due to
3 learning and discipline problems and the need for special
4 education. (Tr. 42-45, 66.) Plaintiff's treating physician
5 notes attention deficit hyperactivity disorder (ADHD) by history.
6 (Tr. 42-45, 323.) The claim was denied initially and on
7 reconsideration. (Tr. 35-37, 39-41.) A hearing was held on
8 October 19, 2006, before Administrative Law Judge (ALJ) Peter J.
9 Baum, at which time testimony was taken from plaintiff's mother,
10 Bertha Ornelas. (Tr. 334-344.) Plaintiff was represented by
11 counsel. On February 16, 2007, the ALJ issued a decision finding
12 that plaintiff was not disabled. (Tr. 16-27.) The Appeals
13 Council denied a request for review. (Tr. 4-6.) Therefore, the
14 ALJ's decision became the final decision of the Commissioner,
15 which is appealable to the district court pursuant to 42 U.S.C. §
16 405(g). On November 14, 2007, plaintiff filed this action for
17 judicial review pursuant to 42 U.S.C. § 405(g) (Ct. Rec. 2, 4).

18 **STATEMENT OF FACTS**

19 The facts have been presented in the administrative hearing
20 transcripts, the ALJ's decision, the briefs of both plaintiff and
21 the Commissioner and will only be summarized here. When plaintiff
22 was 4 years old, she was found eligible for special education
23 services. (Tr. 151.) She received services in the areas of
24 communication and cognition. (Tr. 152.) At age nine, after
25 further testing, it was recommended that Plaintiff receive special
26 education in reading comprehension and written language skills.
27 (Tr. 151, 156.)

28 Plaintiff was 10 years old at the time of the hearing. (Tr.

1 88, 337.) Ms. Ornelas, plaintiff's mother, testified that
2 plaintiff is behind in school and takes special education classes
3 in the afternoon. (Tr. 337-338.) Ms. Ornelas testified that she
4 needs to ask plaintiff four to five times to do chores; she is
5 very violent toward her siblings, including throwing things at and
6 kicking her brothers without provocation. (Tr. 339.) Ms. Ornelas
7 stated plaintiff has friends at school, was once sent to the
8 school counseling center, has never been suspended, and repeated
9 second grade. (Tr. 340.) Ms. Ornelas testified that plaintiff
10 attended summer school twice in order to be promoted to the next
11 grade. (Tr. 341.) She stated that after a house fire in
12 September or October of 2003, plaintiff has had trouble sleeping.
13 Even though she goes to bed at eight or nine at night, plaintiff
14 is awake at midnight or one a.m. (Tr. 341-342.) Ms. Ornelas
15 testified that a teacher called to inform her that on one occasion
16 plaintiff's head was down, she was tired, and was not paying
17 attention. (Tr. 342.)

18 SEQUENTIAL EVALUATION PROCESS

19 To qualify for disability benefits, a child under the age of
20 eighteen must have "a medically determinable physical or mental
21 impairment, which results in marked and severe functional
22 limitations, and which can be expected to result in death or which
23 has lasted or can be expected to last for a continuous period of
24 not less than 12 months." 42 U.S.C. § 1382c(a)(3)(C)(i). Pursuant
25 to this statutory dictate, the Social Security Administration has
26 enacted a three-step sequential analysis to determine whether a
27 child was eligible for SSI benefits on the basis of a disability.
28 20 C.F.R. § 416.924(a). First, the ALJ considers whether the

1 child is engaged in "substantial gainful activity." *Id.*, at
2 § 416.924(b). Second, the ALJ considers whether the child has a
3 "medically determinable impairment that is severe," which is
4 defined as an impairment that causes "more than minimal functional
5 limitations." *Id.* at § 416.924(c). Finally, if the ALJ finds a
6 severe impairment, he or she must then consider whether the
7 impairment "medically equals" or "functionally equals" a
8 disability listed in the regulatory "Listing of Impairments." *Id.*
9 at § 416.924(c)-(d); *Id.* at pt. 404, subpt. P. Pursuant to the
10 final rules effective January 2, 2001¹, an impairment will be
11 found to be functionally equivalent to a listed impairment if it
12 results in extreme limitations in one area of functioning or
13 marked limitations in two areas. 20 C.F.R. § 416.926a (a). An
14 impairment is a "marked limitation" if it "seriously interferes
15 with [a person's] ability to independently initiate, sustain, or
16 complete activities." 20 C.F.R. § 416.926a(e)(2)(i). By contrast,
17 an "extreme limitation" is defined as a limitation that
18 "interferes very seriously with [a person's] ability to
19 independently initiate, sustain, or complete activities." 20
20 C.F.R. § 416.926a(e)(3)(i).

21 The child's functioning in six domains is assessed, and
22 includes determining the child's ability: (1) to acquire and use
23

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25 On September 11, 2000, the SSA published the Final Rules
26 implementing the Welfare Reform Act, which became effective
27 January 2, 2001 (the "Final Rules"). Supplemental Security
28 Income; Determining Disability for a Child Under Age 18, 65 Fed.
Reg. 54,747 (Sept. 11, 2000) (codified at 20 C.F.R. pts. 404,
416). The Final Rules apply because plaintiff's current
application was protectively filed May 5, 2005, well after
the January 2, 2001, effective date.

1 information; (2) to attend and complete tasks; (3) to interact and
2 relate with others; (4) to move about and manipulate objects; (5)
3 to care for oneself, and (6) health and physical well-being. 20
4 C.F.R. § 416.926a(a)-(b)(2001). In order to demonstrate
5 functional equivalence under the Final Rules, the child must
6 exhibit a marked limitation in two of the domains, or an extreme
7 limitation in one domain. 20 C.F.R. § 416.926a(e)(2)(i).

8 STANDARD OF REVIEW

9 Congress has provided a limited scope of judicial review of a
10 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
11 the Commissioner's decision, made through an ALJ, when the
12 determination is not based on legal error and is supported by
13 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
14 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
15 1999). "The [Commissioner's] determination that a plaintiff is
16 not disabled will be upheld if the findings of fact are supported
17 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
18 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
19 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
20 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
21 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
22 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
23 573, 576 (9th Cir. 1988). Substantial evidence "means such
24 evidence as a reasonable mind might accept as adequate to support
25 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
26 (citations omitted). "[S]uch inferences and conclusions as the
27 [Commissioner] may reasonably draw from the evidence" will also be
28 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).

1 On review, the court considers the record as a whole, not just the
2 evidence supporting the decision of the Commissioner. *Weetman v.*
3 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
4 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

5 It is the role of the trier of fact, not this court, to
6 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
7 evidence supports more than one rational interpretation, the court
8 may not substitute its judgment for that of the Commissioner.
9 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
10 (9th Cir. 1984). Nevertheless, a decision supported by
11 substantial evidence will still be set aside if the proper legal
12 standards were not applied in weighing the evidence and making the
13 decision. *Browner v. Secretary of Health and Human Services*, 839
14 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
15 evidence to support the administrative findings, or if there is
16 conflicting evidence that will support a finding of either
17 disability or nondisability, the finding of the Commissioner is
18 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
19 1987).

20 ALJ'S FINDINGS

21 At step one, the ALJ found that plaintiff has not engaged in
22 substantial gainful activity. (Tr. 19.) At step two, he
23 determined that plaintiff suffers from ADHD. (Tr. 19.) The ALJ
24 determined that the evidence of record demonstrated that
25 plaintiff's impairment, although severe, does not meet, medically
26 equal, or functionally equal the criteria of any of the listings
27 impairments. (Tr. 19-26.) With regard to functional equivalence,
28 the ALJ concluded that plaintiff does not have an "extreme"

1 limitation in any domain of functioning or a "marked" limitation
2 in two domains. (Tr. 26.) Accordingly, the ALJ concluded
3 plaintiff was not under a disability within the meaning of the
4 Social Security Act. (Tr. 26-27.)

5 **ISSUES**

6 Plaintiff contends that the Commissioner erred as a matter of
7 law. Specifically, she argues that the ALJ erred at step three by
8 failing to find that her impairments functionally equaled a
9 Listing because she is "at least markedly limited in two of the
10 domains," and by failing to fully to develop the record with
11 respect to plaintiff's psychological impairments. (Ct. Rec. 19 at
12 12-21.) The Commissioner responds that because the ALJ's step
13 three analysis is supported by the record, and he fulfilled his
14 duty to develop the record, the decision should be affirmed. (Ct.
15 Rec. 23 at 3-13.) The first issue is dispositive.

16 The Court must uphold the Commissioner's determination that
17 plaintiff is not disabled if the Commissioner applied the proper
18 legal standards and there is substantial evidence in the record
19 as a whole to support the decision.

20 **DISCUSSION**

21 A. Step three analysis

22 Plaintiff alleges that the ALJ erred at step three by failing
23 to find that her impairments functionally equaled the Listings
24 because she is "at least markedly limited in two domains,
25 acquiring and using information, and in attending and completing
26 tasks." (Ct. Rec. 19 at 17-21.) The Commissioner responds that
27 the ALJ appropriately analyzed the evidence and fulfilled his duty
28 to develop the record. (Ct. Rec. 23 at 3-13.)

1 In social security proceedings, the claimant must prove the
2 existence of a physical or mental impairment by providing medical
3 evidence consisting of signs, symptoms, and laboratory findings;
4 the claimant's own statement of symptoms alone will not suffice.
5 20 C.F.R. § 416.908. The effects of all symptoms must be
6 evaluated on the basis of a medically determinable impairment
7 which can be shown to be the cause of the symptoms. 20 C.F.R. §
8 416.929. Once medical evidence of an underlying impairment has
9 been shown, medical findings are not required to support the
10 alleged severity of symptoms. *Bunnell v. Sullivan*, 947 F. 2d 341,
11 345 (9th Cir. 1991).

12 A treating or examining physician's opinion is given more
13 weight than that of a non-examining physician. *Benecke v.*
14 *Barnhart*, 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or
15 examining physician's opinions are not contradicted, they can be
16 rejected only with "clear and convincing" reasons. *Lester v.*
17 *Chater*, 81 F. 3d 821, 830 (9th Cir. 1996). If contradicted, the
18 ALJ may reject an opinion if he states specific, legitimate
19 reasons that are supported by substantial evidence. *See Flaten v.*
20 *Secretary of Health and Human Services*, 44 F. 3d 1453, 1463 (9th
21 Cir. 1995).

22 Acquiring and using information

23 The ALJ notes that on October 26, 2006, Steven Gottlieb,
24 M.D., opined that plaintiff has less than marked limitation in the
25 first assessed domain, acquiring and using information. (Tr. 20,
26 referring to Exhibit 3F at Tr. 326.)

27 With respect to the first domain, the ALJ states:

28 In a July 2005 Childhood Disability Evaluation Form,
Edward Beaty, Ph. D., consulting psychologist for the

1 Disability Determination Service (DDS), notes that
2 the claimant is in special education at school. The
3 doctor opines that the claimant has less than marked
4 limitations in the domain of acquiring and using
information (with a recent low average IQ score and
Woodcock Johns and other academic achievement scores
from average to borderline). . .

5 In a November 2005 Childhood Disability Evaluation
6 Form, G. Gilbert, Ph. D., consulting psychologist for
7 the DDS opines that the claimant has less than marked
limitations the domain of acquiring and using information
(with a full scale IQ of 84) . . .

8 (Tr. 19-20.)

9 On May 31, 2005, plaintiff's special education teacher and
10 case worker, Jennie Mathes, assessed plaintiff's ability to
11 acquire and use information. (Tr. 112.) Ms. Mathes assessed
12 "very serious problems" (a rating of 4 on a 1-5 scale) in five
13 areas: understanding school and content vocabulary, reading and
14 comprehending written material, expressing ideas in writing,
15 recalling and applying learned material, and applying problem-
16 solving skills in class discussions. (Tr. 112.) Ms. Mathes
17 assessed obvious problems (a rating of 3) in three other areas
18 within this domain (comprehending and doing math problems,
19 providing organized oral explanations and adequate descriptions,
20 and learning new material). (Tr. 112.) Although the ALJ's
21 finding with respect to this domain mirrors the opinion of her
22 treating physician, that plaintiff is less than markedly limited
23 in the ability to acquire and use information, the ALJ does not
24 discuss Ms. Mathes's assessment with respect to this domain.

25 Attending and completing tasks

26 The ALJ found plaintiff has no limitation in attending and
27 completing tasks. (Tr. 24.) He gave little weight to treating
28 physician Dr. Gottlieb's October 26, 2006 opinion that plaintiff

1 has marked limitations in this domain (that may improve with
2 time). (Tr. 20 referring to Exhibit 3F at Tr. 326.) The ALJ
3 rejected Dr. Gottlieb's opinion because: (1) it is inconsistent
4 with the medical record as a whole and with the DDS opinions; (2)
5 plaintiff showed improvement after only one month of treatment;
6 (3) the doctor appears to have accepted the claimant's subjective
7 complaints, and (4) Dr. Gottlieb appears to be advocating for the
8 patient. (Tr. 21.)

9 On May 31, 2005, plaintiff's special education teacher Jennie
10 Mathes assessed daily "obvious problems" (rating a 3 out of 5) in
11 four areas within this domain: carrying out multi-step
12 instructions, completing homework assignments, completing work
13 accurately without careless mistakes, and completing work at a
14 reasonable pace and finished on time. (Tr. 113.)

15 The only evidence relied on by the ALJ in finding no
16 limitation in the second functional domain appears to be the
17 opinions of the agency consultants. Testimony of a medical expert
18 may serve as substantial evidence when supported by other evidence
19 in the record. *Andrews v. Shalala*, 53 F. 3d 1035, 1041 (9th Cir.
20 1995). Other evidence does not support the ALJ's finding. While
21 plaintiff showed some improvement in sleep and in her grades on
22 February 9, 2006, after a month of treatment as indicated (Tr.
23 318), the opinions of plaintiff's treating physician on October
24 26, 2006, and teacher in 2005 both support finding a degree of
25 impairment not endorsed by the ALJ. The ALJ's finding of no
26 impairment in this domain is not supported by substantial evidence
27 and free of legal error.

1 B. Remand

2 "If additional proceedings can remedy defects in the
3 original administrative proceeding, a social security case should
4 be remanded." *Marcia v. Sullivan*, 900 F. 2d 172, 176 (9th Cir.
5 1990)(citing *Lewin v. Schweiker*, 654 F. 2d 631, 635 (9th Cir.
6 1981). Where the Secretary is in a better position than this
7 court to evaluate the evidence, remand is appropriate. See
8 *McAllister v. Sullivan*, 888 F. 2d 599, 603 (9th Cir. 1989).

9 As noted, the ALJ failed to adequately address the opinions
10 of plaintiff's treating physician and teacher when he assessed
11 less than marked limitation in the domain of acquiring and using
12 information, and no limitation in the domain of attending and
13 completing tasks, from the date of onset (May 5, 2005) forward.

14 It is unclear from the record whether plaintiff would be
15 found disabled if the relevant evidence was properly analyzed.
16 Remand is appropriate because the Commissioner is in a better
17 position than this court to evaluate the evidence. See
18 *McAllister*, 888 F. 2d at 603. The court expresses no opinion as
19 to what the ultimate outcome on remand will or should be. The
20 fact-finder is free to give whatever weight to the evidence is
21 deemed appropriate. See *Sample v. Schweiker*, 694 F. 2d 636, 642
22 (9th Cir. 1982)("Q)uestions of credibility and resolution of
23 conflicts in the testimony are functions solely of the
24 Secretary").

25 Accordingly,

26 **IT IS ORDERED:**

27 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 18**) is
28 **GRANTED**; the matter is **REMANDED** to the Commissioner for additional

1 proceedings.

2 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 22**) is
3 **DENIED**.

4 3. Judgment shall be entered for **PLAINTIFF**. An application
5 for attorney fees may be filed by separate motion.

6 4. The District Court Executive is directed to enter this
7 Order, provide a copy to counsel for Plaintiff and Defendant, and
8 **CLOSE** the file.

9 **DATED** this 3rd day of September, 2008.

10
11 s/James P. Hutton
12 JAMES P. HUTTON
13 UNITED STATES MAGISTRATE JUDGE
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